Anwar et al v. Fairfield Greenwich Limited et al Doc. 89

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	:	Master File No. 09 CV 0118 (VM)
	:	09 CV 2366 (VM) (Ferber Action)

PLAINTIFF DAVID I. FERBER SEP IRA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO REMAND AND TO VACATE CONSOLIDATION ORDER

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INTRODUCTION

Plaintiff David Ferber SEP IRA, a limited partner of nominal defendant Greenwich Sentry, L.P. ("Greenwich Sentry" or the "Fund"), filed this *derivative* action (09 Civ. 2366) on behalf of the Fund in the New York Supreme Court, County of New York. ¶ 1.[1] Defendant Fairfield Greenwich Advisors LLC ("FGA") improperly removed the action to this Court, invoking the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

CAFA grants federal courts subject matter jurisdiction over class actions, provided they meet certain requirements. Although FGA seeks to recharacterize (or, more accurately, mischaracterize) this action as a *class* action, nothing in CAFA permits such tactics. Because this is *not* a class action, there is no jurisdiction. Accordingly, the case should be remanded.

The Court also should vacate its March 24, 2009 Order, *see* Dkt. No. 5, 09 CV 2366, consolidating this action with the class action litigation, *Anwar v. Fairfield Greenwich Group*, 09 CV 0118 (VM) ("*Anwar*"). *See generally Anwar* Consolidation Order, Dkt. No. 21-2, ¶ 7, 09 CV 0118. As shown below, consolidation is inappropriate because, among other things, plaintiffs' counsel in the *Anwar* class action would be conflicted from prosecuting the derivative claims in this action.[2]

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[1] References to "¶ __" are to the "Limited Partner's Derivative Complaint" ("Complaint"), annexed as Exhibit A to the Amended Notice of Removal, dated March 19, 2009. *See* Dkt. No. 6, 09 CV 2366.

[2] The undersigned counsel also represent plaintiffs in *Pierce v. Fairfield Greenwich Group*, 09 CV 2588 (VM), which also was removed to this Court by FGA and recently consolidated with *Anwar*. *See* Dkt. No. 5, 09 CV 2588. It is anticipated that a similar motion to remand and to vacate the consolidation order in that action will be filed in the near future.

FACTUAL BACKGROUND

On February 13, 2009, plaintiff, a limited partner of nominal defendant Greenwich Sentry, filed a "Limited Partner's Derivative Complaint" on behalf of Greenwich Sentry. Greenwich Sentry is a limited partnership organized under the laws of Delaware, with principal offices in New York City. ¶ 14. The defendants include, among others, Fairfield Greenwich Limited, which served as the Fund's general partner from January 1998 to March 1, 2006, ¶ 16, and Fairfield Greenwich Advisors LLC, which provides administrative services for the Fund. ¶ 18. As alleged in the Complaint, in violation of their fiduciary duties, defendants mismanaged the Fund's business.

On December 10, 2008, it was publicly disclosed that Bernard Madoff, through his firm, Bernard L. Madoff Investment Securities, LLC ("BMIS"), had been running a Ponzi scheme. ¶ 2. All or almost all of the Fund's assets had been invested with Madoff and BMIS, ¶ 5, and it is believed that nearly all of the those assets have been lost. *Id.*

Plaintiff alleges that the defendants breached or aided and abetted breaches of duties owed to the Fund. Among other things, defendants failed to "safely manage the Fund's assets," ¶¶ 82(a), 90(a), 93(a), 97(a), and to investigate "red flags" regarding BMIS. ¶¶ 82(c), 90(c), 93(c), 97(c).

ARGUMENT

I. THE COURT SHOULD REMAND THE ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

A. Defendant Bears the Burden of Proof

The Second Circuit has held that, under CAFA, defendant has the burden of establishing subject matter jurisdiction. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("we hold that CAFA did not change the traditional rule and that defendant bears the burden of establishing federal subject matter jurisdiction"); *see also DiTolla v. Doral Dental IPA of New York, LLC*, 469 F.3d 271, 275 (2d Cir. 2006). The defendant can meet its burden only by "prov[ing] to a reasonable probability" that the CAFA requirements have been satisfied. *See Blockbuster*, 472 F.3d at 59.

In determining whether a defendant has met its burden, the Court should be mindful of the strong presumption against removal. "In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability." *Lupo v. Human Affairs Int'l*, 28 F.3d 269, 274 (2d Cir. 1994) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941)); *see Chiropractic Neurodiagnostic, P.C. v. Allstate Ins. Co.*, No. 08-CV-2319, 2009 U.S. Dist. LEXIS 5822, at *7-8 (E.D.N.Y. Jan. 26, 2009) (remanding case removed under CAFA, explaining that "any doubts" must be "resolved against removability 'out of respect for the limited jurisdiction of the federal courts and the rights of states.'") (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods.*, 488 F.3d 112, 124 (2d Cir. 2007)); *Fisher v. Beverly Enters., Inc.*, No. 05-CV-00316, 2005 U.S. Dist. LEXIS 38870, at *3 (E.D. Ark. Dec. 12, 2005). Here, defendants cannot meet their burden.

B. This is Not a "Class Action"

CAFA establishes federal subject matter jurisdiction over class actions that meet certain requirements, including those relating to the amount in controversy, class size and diversity. *See* 28 U.S.C. § 1332(d). To qualify as a "class action" under CAFA, the case must have been "filed under" Rule 23 of the Federal Rules of Civil Procedure, or a state law counterpart. *See* 28 U.S.C. § 1332(d)(1)(B).[3]

[3] Section 1332(d)(1)(B) states:

[footnote continued]

Here, it is undisputed that the action was not "filed under" Rule 23 or a state law counterpart.[4] It was filed as a derivative action.[5] Thus, it does not qualify as a class action under CAFA. *See Beverly Enters.*, 2005 U.S. Dist. LEXIS 38870, at *5 (remanding case removed under CAFA: "Because the lawsuit was not filed under Rule 23 or a similar state statute as a class action, this Court has no jurisdiction."); *see generally Blockbuster*, 472 F.3d at 56 (explaining that section 1332(d)(1) "defines a class action as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or a similar state rule …."); *compare with Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 78 (S.D.N.Y. 2006) (action qualified as "class

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> the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action ….

28 U.S.C. § 1332(d)(1)(B).

[4] *See generally* N.Y. Civ. Prac. Law & Rules, Article 9 (Class Actions).

[5] FGA acknowledges that fact. *See* Amended Notice of Removal, at ¶ 1 (the case was brought as a "putative derivative action"). As the "master of the complaint," plaintiff gets to choose how to plead. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 387 (1987); *see also Sung v. Wasserstein*, 415 F. Supp. 2d 393, 398 (S.D.N.Y. 2006) (Marrero, J.) ("[A] plaintiff, as master of her complaint, is free to avoid federal jurisdiction by pleading only state claims even where a federal claim is also available") (internal quotations and citation omitted). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 n.6 (1986).

Whether direct, non-derivative claims are available to the Fund's investors is thus beside the point. *But see Broome v. ML* Media *Opportunity Partners L.P.*, 273 A.D.2d 63, 64, 709 N.Y.S.2d 59, 60 (1st Dep't 2000) (limited partners lacked standing to assert class action claims that "allege no more other than the mismanagement and diversion of assets, and do not implicate any injury to plaintiffs distinct from the harm to the partnership.") (citations omitted); *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (holding that lawsuit, although brought as class action, was really a derivative action, noting that the "gist" of the complaint was that "the general partners breached their fiduciary duties by inadequately investigating and monitoring investments and by placing their interests in fees above the interest of the limited partners.").

action" under CAFA where plaintiff filed suit "on her own behalf and on behalf of a class of persons under [Fed. R. Civ. P.] 23(a), (b)(2), and (b)(3).") (brackets in original).

C. This is not a "Mass Action"

Under CAFA, if an action is not a "class action" under section 1332(d)(1)(B), it still may be "deemed" one if it is a "mass action" that otherwise satisfies the requirements of 28 U.S.C. §§ 1332(d)(2)-(10). *See* 28 U.S.C. § 1332(d)(11)(A). CAFA defines a "mass action" as

> any civil action … in which *monetary relief claims of 100 or more persons are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [section 1332](a).

28 U.S.C. § 1332(d)(11)(B) (emphasis added).

But here, the claims are *derivative* claims on behalf of the nominal defendant. Thus, the action does not assert individual claims (monetary or otherwise) of 100 persons -- much less claims of 100 persons that are proposed to be tried jointly. *See generally Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 57 A.D.3d 411, 869 N.Y.S.2d 506, 507 (1st Dep't 2008) ("Even if plaintiff limited partners' claims of fraudulent inducement are sufficient, as a legal matter, to support a direct claim against the partnership's auditor, … they failed to submit evidence to raise an issue of fact in opposition to defendant's prima facie showing that the damages claimed all emanated from losses that took place after the initial investment, did not affect plaintiffs differently from other limited partners, *and were therefore derivative* ….") (emphasis added) (citations omitted); *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) ("Delaware courts have long recognized that actions charging 'mismanagement which depress[] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action.'") (brackets in original, citations omitted); *cf. Sung v.*

Wasserstein, 415 F. Supp. 2d 392, 408 (S.D.N.Y 2006) (Marrero, J.) (remanding derivative lawsuit that had been removed under Securities Litigation Uniform Standards Act ("SLUSA"), noting that the case was "not a class action").[6]

The absence of 100 claimants in the Complaint thus is fatal to any "mass action" approach. *See Villareal v. Dole Food Co.*, No. 09-CV-189, 2009 U.S. Dist. LEXIS 22892, at *13 (C.D. Cal. Mar. 9, 2009) ("These actions do not constitute 'mass actions' under CAFA because each of these actions has been brought by less than 100 plaintiffs."); *compare with Galstaldi v. Sunvest Cmtys. USA, LLC*, No. 08-CV-62076, 2009 U.S. Dist. LEXIS 16777, at *6 (S.D. Fla. Feb. 17, 2009) (action was "mass action" where, *inter alia*, "[t]he Complaint on its face names 177 individual Plaintiffs, thereby appearing to satisfy the numerosity requirement.").

Moreover, because the claims are derivative, no plaintiff -- much less 100 persons -- could satisfy the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a). Accordingly, there is no jurisdiction here.[7]

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[6] SLUSA requires, *inter alia*, that the lawsuit (or group of lawsuits) seek damages "on behalf of more than 50 persons …." *See* 15 U.S.C. § 77p(f)(2)(A). In *Sung*, the Court found that SLUSA's "conditions [had] not been satisfied" with respect to the derivative action. 415 F. Supp. 2d at 408, *see id*. at 407 ("None of these conditions are met here.").

[7] According to FGA, "the Complaint alleges that *Plaintiffs have suffered damages* based on the alleged mismanagement of $221 million, …, including the payment of 'over $9.5 million in fees … for duties not performed.'" *See* Amended Notice of Removal, at ¶ 7(f) (citing ¶¶ 36, 85) (emphasis added). But the Complaint does not describe those amounts as damages suffered by plaintiffs. And, of course, there is just one plaintiff in this action.

Moreover, the fact that limited partners may indirectly benefit from the successful prosecution of the litigation (in the sense that they are investors in an entity on whose behalf the derivative action is litigated) does not change the fact that this is a derivative action and not a class action. Indeed, conventional pleading practices recognize that investors can benefit from a derivative action. *See Bender's Forms of Pleading of the State of New York*, Form No. 6:13, Allegations in Shareholders' Derivative Action, ¶ 1 (available on LEXIS; jurisdiction: New York; source categories: Forms) ("[P]laintiff was and still is a stockholder of the defendant … and sues on behalf of himself (*or* herself) and all other stockholders of the defendant corporation."); *Bender's*

[footnote continued]

D. CAFA's Exclusions Preclude Jurisdiction

Even assuming, *arguendo*, that this were a class action and otherwise satisfied CAFA's requirements, jurisdiction still would be unavailable because the claims of the class hypothesized by FGA implicate the internal affairs of the nominal defendant, Greenwich Sentry, and the duties that defendants owed it. CAFA, however, excludes such claims from its reach. Specifically, CAFA provides that subject matter jurisdiction under section § 1332(d)(2) "shall not apply to any class action that solely involves a claim"

> that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized ….

28 U.S.C. § 1332(d)(9)(B).

In this case, the claims arise under state law and quintessentially relate to the "internal affairs or governance" of Greenwich Sentry, including defendants' mismanagement of the Fund's affairs and their failure to discharge their fiduciary duties.[8] As such, even if this were a class action (it is not), there would be no jurisdiction under section 1332(d)(2)(B). As the

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Federal Practice Forms, Form No. 23.1:11, Complaint in Stockholder's Suit Based on Conspiracy to Waste and Misappropriate Assets, ¶ 3 (available on LEXIS; jurisdiction: Federal; source categories: Forms) (form for derivative complaint under Fed. R. Civ. P. 23.1: "Plaintiffs bring this action on behalf of themselves and all other stockholders of _______ [*name of first corporate defendant*] similarly situated."); *West's McKinney's Forms*, Derivative Actions, § 8:2 (available on Westlaw; database: MCF-BCL; citation text: MCF Business 8:2) (form for derivative complaint under N.Y. Bus. Corp. Law § 626: "The plaintiff …, complaining of the defendants, in the right of *[name of defendant corporation]*, to procure a judgment in its favor, and suing on behalf of all the shareholders thereof similarly situated, respectfully shows and alleges ….").

[8] In *Blockbuster*, the Second Circuit raised, but did not resolve, the issue as to which party bears the burden of proof concerning CAFA's "exceptions" under 28 U.S.C. §§ 1332(d)(3) and (5). *See* 472 F.3d at 58. Plaintiff submits that, as to 28 U.S.C. § 1332(d)(9)(B), defendants bear the burden of proof. The issue, however, is academic here because even if plaintiff bears the burden, it has been satisfied.

Northern District of California court explained in finding that CAFA jurisdiction was unavailable under section 1332(d)(9)(B):

> [P]laintiff alleges defendants, in their role as general partners of the Textainer partnerships, (1) rendered the sale of the assets of the partnerships "fundamentally unfair" to the limited partners by demanding that all potential bidders agree to enter into a management contract with one of the defendants, (2) rendered the sale "fundamentally unfair" to the limited partners by undervaluing Textainer's assets, and (3) gained support for the sale by distributing materially misleading proxy statements to the limited partners. Each of these alleged acts affects plaintiff and the other limited partners solely in their capacity as limited partners of the Textainer partnerships. Indeed, plaintiff essentially claims that defendants "fraudulent[ly] or negligent[ly] mismanage[d]" the partnership's affairs, and "unlawfully profit[ed] at the [partnership's] expense." Moreover, the fiduciary duties allegedly breached arise solely because of the parties' relationship as partners of the Textainer partnerships.

In re Textainer P'ship Sec. Litig., No. 05-CV-0969, 2005 U.S. Dist. LEXIS 26711, at *19-20 (N.D. Cal. July 27, 2005) (brackets in original, citations omitted).[9]

E. Plaintiff Should be Awarded Costs

Under 28 U.S.C. §1447(c), the court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In evaluating such relief, the Court properly considers whether the removing party "lacked an objectively reasonable basis

[9] We also submit that, even if this were a class action under CAFA, jurisdiction also would be unavailable because of section 1332(d)(9)(C). That section provides that section 1332(d)(2) "shall not apply to any class action that solely involves a claim … that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder)." 28 U.S.C. § 1332(d)(9)(C). *See Textainer P'ship*, 2005 U.S. Dist. LEXIS 26711, at *24 (§ 1332(d)(9)(C) applied "[b]ecause the sole claim in the *Labow* action concerns, exclusively, 'fiduciary duties relating to or created by or pursuant to' the limited partnership interests in the Textainer partnerships, and those interests are securities"); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 35-38 (2d Cir. 2008) (Poller, J., dissenting). We are aware that our position is contrary to the Panel's majority ruling in *Pew*, *see* 527 F.3d at 31-32, and respectfully submit that the majority erred. Nonetheless, we raise the issue now to preserve it for possible appellate review and rectification.

for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, there was no reasonable basis for the removal. Accordingly, plaintiff should be awarded costs.

II. THE COURT SHOULD VACATE THE CONSOLIDATION ORDER

By Order dated March 24, 2009, the Court consolidated this derivative action with the *Anwar* class action litigation "for all purposes."[10] In accordance with paragraph 7 of the January 27, 2009 Order in *Anwar*, plaintiff moves to vacate the consolidation order. It should be vacated for two reasons.

First, as shown above, there is no subject matter jurisdiction here. In the absence of such jurisdiction, the consolidation order should be vacated. *See Textainer P'ship*, 2005 U.S. Dist. LEXIS 26711, at *32.

Second, prosecution of these derivative claims by the class action plaintiffs and their counsel in the *Anwar* federal class action would create an impermissible conflict of interest. *See St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler*, No. 06-CV-688, 2006 U.S. Dist. LEXIS 72316, at *23 (S.D.N.Y. Oct. 4, 2006) ("Courts in this Circuit have long found that plaintiffs attempting to advance derivative and direct claims in the same action face an impermissible conflict of interest.") (citing authorities). For that reason alone, consolidation is not appropriate.

[10] *See* Dkt. No. 5, 09 CV 2366. By Order dated March 31, 2009, the Court also consolidated another derivative action, the *Pierce* action, with *Anwar* "for all purposes." *See* Dkt. No. 5, 09 CV 2588. Subsequently, by memo-endorsed Order filed April 6, 2009, the Court indicated that the consolidation of *Pierce* with *Anwar* was for the purposes of promoting "coordination of discovery and other pretrial proceedings." *See* Dkt. No. 7, 09 CV 2588.

CONCLUSION

For the foregoing reasons, the case should be remanded to state court, and the consolidation order should be vacated.

Dated: April 8, 2009

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